CONSIDERING THE SOURCE: THE DRAMATIC IMPLICATIONS OF ONTARIO'S *NEW CLEAN WATER ACT*

The last wave of new environmental legislation in response to the Walkerton Tragedy has finally arrived.

The well water contamination crisis that hit that southwestern Ontario town in May 2000, causing seven deaths and health issues for 2,300 town residents, triggered a number of legislative initiatives to protect Ontario's drinking water. Over six years later, the Province has now rolled out the final piece of Mr. Justice Dennis O'Connor's "multi barrier legislative blue print"[1]. The *Clean Drinking Water Act* (CWA) came into force on October 19, 2006. It is by far the most ambitious, groundbreaking environmental statute in a generation and could have profound impacts on the powers and responsibilities of municipalities.

The scope and ambition of the CWA is breathtaking. So is the Act's potential to transform the municipal role in the areas of land use planning and environmental protection. This article will outline the general framework for the Act, and describe the process for creating the Act's powerful new regulatory tool, Source Protection Plans (SSPs). It will then focus in the part of the CWA with the most profound and lasting implications for municipal government: Part IV which gives municipalities the thankless, expensive, conflict laden task of implementing and enforcing the environmental protection restrictions and prohibitions that will flow from SPPs.

[1]The shock waves from Walkerton triggered a lengthy provincial inquiry and two volume report recommending far-reaching legislative change by Mr. Justice O'Connor

Framework of the CWA

Part II of the CWA establishes a complex multi-stakeholder process for the preparation and approval of SPPs. Once approved, these plans will impose land use restrictions and new source water protection rules in areas where drinking water sources are at risk. One groundbreaking aspect of the Act's approach is that SPPs will be developed on a watershed basis with Conservation Authorities playing a pivotal role.

The CWA designates the areas over which a Conservation Authority has jurisdiction as a "drinking water source protection areas". The Act provides for the creation of amalgamated groupings of conservation authorities into regions, and empowers the Minister of the Environment to establish source protection authorities (SPAs). Each SPA will be the lead Conservation Authority within its region responsible for overseeing the development of SPPs. The SPA's first job is to set up Source Protection Committees to carry out a number of steps leading to the development and Ministerial approval of an SPP.

Part IV of the Act sets out an implementation and enforcement regime to deliver source protection. Restrictions and prohibitions, mandated by the SPP, will be imposed on existing and future land uses and business activities to protect drinking water sources.

Establishing Source Protection Plans

The Act sets out a three stage process leading to the approval of Source Protection Plans: 1) developing a Terms of Reference; 2) conducting a comprehensive watershed-wide assessment of the source waters for municipal drinking water supplies and the issues and risks surrounding these resource; and 3) developing the Source Protection Plan. All three documents (Terms of Reference, Assessment Report, and Source Water Protection Plan) are prepared by the Source Water Committee, with extensive public involvement, submitted to the Source Protection Authority, and ultimately approved by the Ministry of the Environment (MOE).

The Terms of Reference must describe the studies and other steps that will be carried out to complete both the Assessment Report and SSP. The Assessment Report, the contents of which are described in section 15 of the CWA, will comprehensively describe ground and surface water conditions across the watershed, identify all the significant ground water recharge areas, “highly vulnerable aquifers”, and the surface water intake and well head areas across the watershed need to be protected. The Assessment Report must identify all the “drinking water issues” in these “vulnerable areas”. For each of these areas, the report must identify both (1) current activities and (2) conditions that result from past activities that represent a drinking water threat.

Once these activities and conditions are identified, the report must then determine which threats are “significant”. This is an important step. Significant threats to municipal drinking water sources trigger a strong regulatory response under Part IV of the Act. The Assessment Report will provide the critical information that dictates the content of the Source Water Plan itself. Once the Report has been approved by MOE, the process begins to develop and obtain approval of the SWP.

The Act allows municipalities a supporting role in this three stage process. Municipal Councils within each source protection area may pass resolutions requiring the Terms of Reference to consider existing or planned municipal drinking water systems. In addition, the Act, perhaps unnecessarily, gives the go-ahead to municipalities to pass resolutions expressing comments on draft Source Protection Plans.

Implications: Municipalities have a largely advisor responsibility in the development and approval of SSPs. Once approved, however, Source Water Protection Plans significantly affect existing municipal powers with respect to land use planning decisions by

- mandating conformity of existing Official Plans and Zoning By-laws to the Significant Threat and Designated Great Lakes Policies of the plans, and provides that these source protection policies prevail in the event of conflict;

- prohibiting municipalities from carrying out any public works, or other any undertakings that conflict with these policies;

- prohibiting municipalities from passing by-laws for any purpose that would conflict with these policies; and

- requiring municipalities to generally have regard to all other policies in the Plan in making planning decisions.

The CWA also empowers the Ministers of Environment and Municipal Affairs to jointly amend Official Plans to ensure conformity with the Source Water Protection Plan.

Here is the really revolutionary aspect of Source Protection Plans. Planning documents typically only regulate future land use. In contrast, SPPs also authorize the retroactive imposition of restrictions, and even prohibitions, on existing uses and business activities which have been identified as posing a significant threat to drinking water. It seems apparent that the new rules established under SPPs could have a profound impact on the existing businesses, and the present and future tax base and employment potential of a municipality.

It is likely that the Province recognizes the powerful impact that SPPs will have on many businesses. That may be one reason why it is sending out the message that the development of SPPs will be slow and sure. Rules and regulations guiding the development Assessment Reports and SPPs will be developed with consultation over the next year. The Terms of Reference to carry out the studies required to develop SSP are not due until at least the end of 2007. It could be years before the first Source Water Protection Plan is in place.

Overall, municipalities are in the passenger seat in the development of Source Protection Plans, especially compared to their decision-making responsibilities for land use planning under the *Planning Act*. But, as discussed below, once this unwieldy new regulatory vehicle comes off the assembly line, it is the municipality that has to do the driving.

Municipal Implementation and Enforcement

As noted above the CWA downloads primary responsibility for ensuring compliance with Source Water Protection Plans to municipalities. Part IV of the Act sets out a complex and potentially invasive enforcement program. In section 47, the Act allocates the implementation and enforcement function to all single tier municipalities and any other municipalities which have the authority to pass by-laws related to municipal drinking water systems. The enforcement tools made available to municipalities are every bit as broad and sweeping as the

current powers available to the Ontario Ministry of the Environment to enforce the provinces other environmental legislation.

Here is how this unique and pioneering compliance scheme works. The primary target of regulation and enforcement under the Act are uses and activities which pose a “significant drinking water threat”. Municipalities will be required to appoint Risk Management Officials (RMOs) - akin to Chief Building Officials - to head up the enforcement effort. In addition, municipalities will appoint risk management inspectors - akin to By-law Enforcement Officers - who carry out the policing function.

The key compliance tool under the CWA is called a Risk Management Plan (RMP). Risk Management Plans are defined as plans to reduce a risk to a drinking water source. RMOs will have the task of preparing RMPs. Guidance is coming from the province, in the form of regulations and rules issued by the MOE, which will give municipalities a better understanding of what Risk Management Plans are intended to look like. The objective however is clear from the Act: RMPs will restrict and regulate business activities that pose a significant drinking water threat.

Municipal counsel's are given the power, under section 55 of the Act to pass by-laws dealing with various aspects of enforcement including establishing inspection programs, providing for voluntary applications by businesses for Risk Management Plans and associated fees, establishing penalties, including payment of collections costs and establishing forms, notices and other administrative matters with respect to Risk Management Plans.

Even before SSPs take effect, municipalities, through their RFOs, will need to take actions. Regulations under the Act will list certain activities that could pose a threat to source water. Section 56 anticipates that the Assessment Report would identify which of these prescribed activities are posing a significant drinking water threat within the Source Protection Area. RMOs will then be expected to put in place Interim Risk Management Plans for those activities even before the SSP has been approved for the Area.

Once the Source Protection Plan is in place, additional municipal enforcement responsibilities kick in. First, the Plan will designate activities which are prohibited in certain areas in the municipality (section 57). RMOs and their investigators may be given the task of enforcing these prohibitions.

Second, the Plan will also identify another category of activities will only be permitted if a Risk Management Plan is put in place. Municipal Staff would work with businesses to develop and implement Risk Management Plans, and if agreement cannot be reached, take steps to impose RMPs on businesses whose activities pose a significant threat to source water (section 58). Risk Management Plans could require property owners to investigate and clean up historical contamination in much the same way that MOE Provincial Officers currently impose clean-up orders.

Third, the Plan will prohibit planning (land use/ zoning amendments) and building permits applications involving specified land uses in areas identified in the Plan (section 59). If a property owner wishes to make a land use change, but the Plan prohibits the proposed land use, an application must be made to the Risk Management Official. Such a use would only be permitted if the applicant can demonstrate to the Risk Management Official that the activity does not pose a significant drinking water threat or if agreement can be reached with the RMO on a Risk Management Plan.

Decisions made by RMOs to impose Risk Management Plans are subject to appeals by businesses and property owners. The appeal goes to the Environmental Review Tribunal, the same hearings body that adjudicates appeals of MOE environmental orders. Risk Management Inspectors are given inspection powers under section 67 of the CWA for the purposes of enforcing the requirements RMPs and prohibitions established under section 57.

Implications: There are still a number of uncertainties about how Part IV of the Act will play out and how municipalities will be involved. The Act also leaves open the possibility that the Ontario Ministry of the Environment could take on the enforcement function in some municipality. In certain cases, agreements can be entered into with other agencies including Boards of Health and the Source Protection Authority to take over municipal enforcement responsibilities. Much will depend on upon the form and content of regulations and rules to be passed pursuant to the Act.

Overall though, CWS appears to usher in an era of municipal responsibility for environmental compliance. This ambitious realignment of responsibilities to the province to local governments raises a host of knotty issues. Currently, the Ontario Ministry of Environment through its provincial officers and other enforcement personnel do the job of imposing orders on businesses to investigate, cleanup and control contaminants which are posing a threat to drinking water. Most, although not all, Ontario municipalities have very little in-

house expertise or experience to take on this difficult enforcement function with all its technical challenges. The province is so far silent on whether it is envisioning a transfer of expertise from the provincial to the local level, and if so how this transfer would be managed.

More to the point, the province has also not yet begun to discuss what funding will be available to municipalities to take on these new responsibilities. The new municipal financial burden would be substantial. Municipalities may have to take on the same investigation and prosecutorial functions currently carried out by MOE. For example, lawyers and consultants may be needed for regular appearances before the ERT to defend RMO decisions to impose RMPs on businesses.

The Act does provide for fees to be imposed on affected businesses and through the collection of penalties for non compliance. Even if municipalities have the gumption to extract fees and penalties from businesses already reeling from new regulatory requirements, this may not be enough.

Under the Act, municipalities will have the job of imposing new rules and restrictions on long established businesses, or in some cases, delivering the news that a business must close up shop and move to another location because of the threat it poses to a municipal water supply. This will clearly be a contentious undertaking. Municipalities will be place in the position of defending

the technical findings and difficult administrative judgments surrounding the creation and enforcement of Risk Management Plans, in the face of vigorous, motivated opponents. Implementation mistakes raise the specter of civil liability. One overriding concern is that the new enforcement responsibilities could put municipal councils on a collision course with important members of their business community.

Conclusion

The CWA presents potentially significant changes in the way land use planning and the environmental business activities are carried out in Ontario. It gives municipalities a front line role in implementing these changes. The key elements of the Act are likely to roll out at a glacial place. The focus over the next few years will be studying the issues and putting in place Source Protection Plans, with work focused at the Conservation Authority level. Like a glacier, however, the CWA has the potential to transform the landscape - in this case the regulatory landscape for municipalities in dealing with environmental protection issues. It is not too early for Ontario municipalities to turn their minds to how best to set boundaries on, and manage risks and liabilities of, the fundamental implementation role that the Province is asking them to play.